In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE SOUTHERN PACIFIC COMPANY, appellant, *v.* THE UNITED STATES. } No. 202.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims in favor of the Government, wherein the petition was dismissed. The lower court (R., p. 11) says:

> * * * it is readily discernible that the case is exceedingly important because applicable to similar cases involving large amounts and almost daily accountings.

The material facts are, that the appellant operates a railroad from San Francisco, Cal., to Portland, Oreg., via Roseville Junction, a distance of 771.94 miles. From San Francisco to Roseville Junction is 108.03 miles. This portion of the road is operated under lease over lines of the Central Pacific

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Railroad Company. Appellant is subject to the terms of the granting act of Congress to the Central Pacific Railroad Company, approved July 1, 1862 (12 Stat., 489, 493, chap. 120), section 6 of which provides:

> *And be it further enacted*, That the grants aforesaid are made upon condition that said company * * * shall at all times * * * transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service).

From Roseville Junction to Portland, a distance of 663.91 miles, appellant operates also under a lease being restricted by the terms of the act of Congress, approved July 25, 1866 (14 Stat., p. 240, chap. 242), section 5 of which provides:

> *And be it further enacted*, * * * And said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.

During the time in question appellant transported both supplies and troops of the United States Government from San Francisco, Cal., to Portland, Oreg., and *vice versa*, and was paid the published tariff rates, exclusive of the so-called "free haul" over the land-grant portion of the road, which portion extended from Portland to Roseville Junction. The Government, therefore, paid between Roseville Junction and San Francisco only, which was (in round numbers) $\frac{1}{7}\frac{9}{2}$ of the whole distance between the points of shipment. The through tariff from San Francisco to Portland being 51 cents per hundred pounds, the Government paid $\frac{1}{7}\frac{4}{2}$ of that amount, or 7.14 cents per hundred pounds.

Appellant contends, as we understand, that it was entitled to the published local rate of 26 cents per hundred pounds from Roseville Junction to San Francisco on through shipments from Portland via Roseville Junction to San Francisco, for the reason that the Portland-Roseville Junction haul was subject to the statutory contract making it a "free haul" and therefore could not be considered; that thus the shipments must be considered as originating at Roseville Junction or San Francisco and subject to the local published tariff between those points.

Appellant sues for $23,980, being the difference between the amount actually paid at the rate of 7.14 cents per hundred pounds and the local tariff of 26 cents per hundred pounds from San Francisco to Roseville Junction.

The Government maintains that the whole question depends upon the character of the shipments. If they were through shipments, as the Government insists they were, then it was right in paying on a per mileage through rate basis from Roseville Junction to San Francisco, for "private parties" would have paid through rate on a per mileage basis on similar through shipments.

ARGUMENT.

Appellee presents its argument under the following heads:

First. The Government as a shipper stands in the same position as a private party.

Second. The shipments in question were through shipments and would have been so considered had they been for private parties.

Third. Being through shipments, the rates to be applied would be through rates, and the charge for the haul from Roseville Junction to San Francisco would be such portion of the through rate as the distance from Roseville Junction to San Francisco bears to the entire distance from Portland to San Francisco.

Fourth. The division of the through rate upon a mileage basis, including the land-grant haul, between Portland and Roseville Junction is reasonable and accords with long-established administrative practice and has been generally acquiesced in by railroads.

FIRST.

THE GOVERNMENT AS A SHIPPER STANDS IN THE SAME POSITION AS A PRIVATE PARTY.

Section 6 of the act of Congress of July 1, 1862, *supra*, clearly provides that for all service performed for the Government on or over the railroad in question from San Francisco to Roseville Junction the operating company shall charge the Government only what it would if the service were performed for a private shipper. If the shipment was local from San Francisco to Roseville—that is, if Roseville was the "destination"—the rate would be the one prescribed for the haul between those points, and if the shipment originating at San Francisco was "through" to Portland the rate would be the "through" rate. Up to the point of payment every step taken in transportations for the Government must be the same as in the case of a private shipper. The private shipper is required to pay cash. In the case of a through shipment from San Francisco to Portland, or vice versa, the Government had already paid by the donation of land to the railroad company for that proportion of the whole charge accruing between Portland and Roseville Junction. This left it to pay in cash for the distance from San Francisco to Roseville Junction *computed on a proportionate mileage basis of the rate for the whole distance.*

SECOND.

THE SHIPMENTS IN QUESTION WERE THROUGH SHIPMENTS AND WOULD HAVE BEEN SO CONSIDERED IN THE CASE OF PRIVATE PARTIES.

A through shipment is determined by its characteristics. There must be continuity of movement and no change of destination while in transit. In the case at bar the shipments from Portland or San Francisco were not terminated at Roseville Junction. They were carried throughout in the same cars. There was no return to the Government at Roseville Junction of the possession of any of these shipments. In no instance did the shipments in question originate at Roseville Junction. They originated at either San Francisco or Portland.

If the shipments had originated at Portland, and their destination was Roseville Junction, and the trains were stopped there, and as an afterthought the goods were reloaded and shipped under a separate contract to San Francisco, then it could have been said that in the subsequent shipments the point of origin was Roseville Junction.

It has been held in the case of *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.* (227 U. S., 111), and many other cases cited therein, that the test of a through shipment does not depend upon the bill of lading. The point of destination of the shipment determines the question as to whether it is a through shipment, regardless of the bill of lading, or whether the shipments were stopped in transit. The destination of

shipments from Portland was San Francisco, and from San Francisco the destination was Portland. Roseville Junction was not the point in either case. If a private party had shipped between Portland and San Francisco, the goods being destined for either point and there was no break in transit, and the goods were not returned to the shipper at any intermediate point, such characteristics would have denoted a through shipment and appellant could not have charged anything more than the through rate. The Government maintains that as its shipments bore the foregoing characteristics they were through shipments.

In the case of the *Montpelier and Wells River R. R. Company* v. *The United States* (187 Fed., 271) a rebating case, the United States circuit court of appeals has recognized the application of the through rate as lawful where there was a joint traffic agreement although the last road handling the commodity had purchased the same for its own use and had required a rebate of the part of the tariff which would have been due it if the shipment had been for other individuals. The shipment was from Echo, Pa., and delivered at Montpelier, Vt., on appellant's railroad, just 6/10 miles beyond where this railroad connects with the Central Vermont Railway. The commodity was coal and was for the use of the Montpelier and Wells River Railroad Company. "The railroads connecting Echo, Pa. with Montpelier, Vt., had established a joint tariff,

for transporting coal from Echo to Montpelier, of $3.55 per gross ton and from Echo to Wells River, and intermediate stations on appellant's line, of $3.80 per gross ton."

If another party had shipped the coal from Echo to the point of destination on the Wells River Railroad Company's road the Central Vermont Railway would have received its proportionate share, being $3.05 per gross ton, and the Montpelier and Wells River Railroad Company would have received 75 cents per gross ton.

The coal was billed (whether inadvertently or not does not appear) to Wells River, Vt. Although it only carried the coal 6/10 miles over its own line, and the coal was for its own use, nevertheless it was held that the fact that appellant had the coal billed at a $3.80 rate and took its divisional share of 75 cents did not, therefore, render it subject to prosecution for receiving a rebate in violation of the interstate commerce act of February 4, 1887, and as amended, etc. In this case the Central Vermont Railroad Company accepted at its terminus a payment, based on the through shipment rate, which was 50 cents per gross ton less than the regular tariff over its own line.

The decision here recognizes the rule and practice of railroads in making a joint through tariff rate of accepting less per mile for a through shipment than they would receive respectively if the shipment were local.

THIRD.

BEING THROUGH SHIPMENTS, THE RATES TO BE APPLIED WOULD BE THROUGH RATES, AND THE CHARGE FOR THE HAUL FROM ROSEVILLE JUNCTION TO SAN FRANCISCO WOULD BE SUCH PORTION OF THE THROUGH RATE AS THE DISTANCE FROM ROSEVILLE JUNCTION TO SAN FRANCISCO BEARS TO THE ENTIRE DISTANCE FROM PORTLAND TO SAN FRANCISCO.

In the case of the *Atchison, Topeka and Santa Fe R. R. Company* v. *United States* (15 C. Cls., 126) it was held that "through service is to be computed at through rates; local at local rates." The shipments in the case at bar being through shipments, appellant was limited to charging the Government under the act of July 1, 1862, *supra*, the same rate per mile per hundred pounds as an individual. The rate per mile per hundred pounds for an individual was 7.14 cents, so that the railroad was only entitled to that amount.

Counsel for appellant asserts on page 12 of his brief that:

> It would seem practically impossible to dispose of this case under the theory of a prepayment of freight charges by means of a land grant, * * *

and further—

> the application of any such theory is not legally permissible, and this for the reason that tariff rates are based upon the money charged; and free passes in settlement of damage claims, newspaper advertisements, or in payment of railroad rights of way, etc., find no

place in the tariffs authorized and required by law.

It is argued, in substance, that the desire for a free haul was not the only motive of the Government in granting lands to the railroad. How this is germane to the question at issue is not clear. The Government maintains that it is immaterial what other motives the Government may have had for granting land to the railroad. A "free haul" was one motive, and a valuable consideration, which was sufficient to bind the railroads to carry the Government's troops and supplies free of charge, and since no subsequent acts of Congress have annulled these contractual relations, the fact exists that these land grants did act as a prepayment of freight charges to appellant. As this method of payment by the Government was created prior to the passage of the act of June 29, 1906 (amendatory of the act to regulate commerce, approved Feb. 4, 1887), and is in no sense nullified by said act, we are unable to understand counsel's contention that the freight shipments for the Government had not been paid in advance from Portland to Roseville Junction. If it was paid in advance to Roseville Junction, then the only charge that could be made from that point to San Francisco, on a through shipment, would be the proportion for the haul from Roseville Junction to San Francisco.

Counsel on page 12 of his brief quotes from the case of the *Louisville & Nashville R. R. Co.* v. *Mottley* (219 U. S., 467, 476, 477). The facts there were that a

railroad company had given free annual passes for a consideration to certain parties for their respective lives. Such passes were declared illegal by the act of June 26, 1906 (amendatory of the act to regulate commerce, approved Feb. 4, 1887). A part of the opinion as quoted by counsel is as follows:

> That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its conference rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, "it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules." It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co. vs. Goodridge*, 149 U. S., 690, 691; *Gulf, Col. &c. Ry. Co. vs. Hefley*, 158 U. S., 98, 102; *I. C. C. vs. Ches. & Ohio Ry. Co.* 200 U. S., 361, 391; *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, 439. (Page 13.)

This case is not apposite. The court's opinion emphasizes the fact that the act to regulate commerce

was primarily enacted to secure uniformity in the charges made by the railroads for transportation of the person and property of individuals, and to guard against or prevent, if possible, the carriers from discriminating between individual shippers or passengers. So far as these matters are concerned, the decision referred to is clear and final, but that is not the issue here. The carriers had a right, so far at least as any restrictions contained in the legislation regulating interstate commerce is concerned, to "discriminate" as between the Government and individuals; that is to say, there is nothing in the act to regulate commerce, approved February 4, 1887, or any of the acts amendatory thereof or supplementary thereto, which forbids a railroad company's departing from its published schedule of rates when the service performed is for the United States. This precise question has never been before this court. The Interstate Commerce Commission, however, ruled on the subject on May 27, 1907:

> The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States Government, and that the rates or fares so made need not be posted or filed with the Commission.
>
> The lawfully published rates or fares for the transportation of the general public, in the opinion of the Commission, are to be re-

garded, however, as the maximum rates and fares that may lawfully be charged the Government for the movement of federal troops.

* * * * * * *

(Conference Rulings Bulletin No. 6, p. 68, sec. 218.)

The soundness of this ruling can not be questioned when we take into consideration the history and purpose of the legislation regulating interstate commerce. It is, however, deemed unnecessary to go into that subject here. The Government was entitled, so far as the law regulating interstate commerce is concerned at least, to receive whatever benefit accrued to it by virtue of the so-called "land grant" contract or any other arrangement made with the carrier for the transportation of its property or its servants.

FOURTH.

THE DIVISION OF THE THROUGH RATE UPON A MILEAGE BASIS INCLUDING THE LAND-GRANT HAUL BETWEEN PORTLAND AND ROSEVILLE JUNCTION IS REASONABLE AND ACCORDS WITH LONG-ESTABLISHED ADMINISTRATIVE PRACTICE AND HAS BEEN GENERALLY ACQUIESCED IN BY THE RAILROADS.

If the propositions advanced under the preceding heads are sound, the Government is entitled to receive the benefit of the through rates from Portland to San Francisco, and the only possible question remaining is upon what basis said through rate should be apportioned. We need not concern ourselves as to what would be an equable and fair division on the theory that two separate lines perform the service on a joint or through rate. The fact is that the road from San Francisco to Portland is one line,

offering to private shippers through rates on a through shipment. We have seen that the Government is entitled to the same treatment as private shippers. The only question, therefore, is what is a fair and reasonable way of apportioning the rate from San Francisco to Roseville Junction. The United States has taken the position in all such cases that a mileage basis of division is fair, i. e., that the through rate should be divided by the whole number of miles from San Francisco to Portland to ascertain the rate per mile. The quotient so obtained should then be multiplied by the number of miles between San Francisco and Roseville Junction. The product multiplied by the number of units transported will give the amount which the claimant is entitled to receive in cash for the through transportation, the remaining portion having been paid for by the land grant as aforesaid.

The fairness of such a basis of division seems obvious. It is very closely analogous to that used in the taxation of interstate railroads and telegraph lines upon such a proportion of their total capital as the mileage within a given State bears to their total mileage.

Pullman Palace Car Co. v. *Pennsylvania* (141 U. S., 18);

W. U. Tel. Co. v. *Attorney General of Mississippi* (125 U. S., 530);

State Railroad Tax Cases (92 U. S., 575);

Erie Railroad v. *Pennsylvania* (21 Wall., 492);

Del. R. R. Tax (18 Wall., 206).

Probably no method could be devised which would measure with absolute accuracy the relative contribution of each road or each section of the same road to the whole transportation, but under ordinary circumstances the mileage basis would approximate such accuracy more closely than any other. It is the method customarily used by the railroads themselves in dividing their joint through rates, unless some particular reason intervenes, as, for instance, a substantial difference in the topography of the country through which the two lines run.

It is also the basis of division (R., 10, finding 14) in use where the through haul is partly over 50 per cent land-grant and partly over nonland-grant road.

Furthermore, appellant has neither suggested any fairer basis of dividing the through rate nor suggested any valid reasons why this basis of division is unfair. Its argument, if we rightly apprehend it, is not that the through rate is unfairly divided, but that it ought not to apply at all.

The mileage basis of division was adopted by the United States from the very first, and, with perhaps some sporadic exceptions, consistently adhered to.

This is shown by a long series of decisions of the Comptroller of the Treasury, of which the following is a partial list:

Digest 2d Comp. Dec., Vol. II, sec. 1070;
Digest 2d Comp. Dec., Vol. III, sec. 1164;
Digest 2d Comp. Dec., Vol. III, sec. 1396;
Digest 2d Comp. Dec., Vol. IV, sec. 360;
8 Comp. Dec., 334, 339;

8 Comp. Dec., 598;
17 Comp. Dec., 486;
18 Comp. Dec., 238;
18 Comp. Dec., 949.

Also the following manuscript opinions:

40 Comp. Letter Book 4, May 1, 1909;
28 MS. Comp. Dec., 722, Feb. 24, 1904;
47 MS. Comp. Dec., 1209, Dec. 2, 1908;
51 MS. Comp. Dec., 848, Nov. 19, 1909;
57 MS. Comp. Dec., 132, Apr. 8, 1911;
58 MS. Comp. Dec., 921, Aug. 31, 1911.

Appellant presented this very claim to the Comptroller of the Treasury. His opinion, favorable to the Government and containing a very full discussion of the history of these land-grant cases and the decisions of prior comptrollers, may be found in 8 *Comptroller's Decisions*, 598. After describing the various kinds of Government-aided roads, (1) bond-aided, (2) 50 per cent land grant, and (3) free land-grant roads, he says (pp. 605, 606, 607):

> The fundamental principle upon which the adjustment of compensation is required to be made is that the basis of compensation should not be in excess of the rates charged the public for the same kind of service. This principle should govern even in the absence of legislation, and whether service is over *aided* or *nonaided* lines. No railroad contends for any other basis of settlement.
>
> Where the earnings are determined in accordance with this principle, settlement therefor is made as required by law: Namely—
>
> Nonaided roads are paid in full;

Bond-aided roads are credited with their earnings;

Fifty per cent land-grant roads are paid one-half of their earnings;

Free land-grant roads are paid nothing.

Where the entire service is over any one of these different classes of roads the determination of the earnings and the settlement therefor present no difficulty.

Where the service is partly over aided and partly over nonaided roads which together form a continuous line, over which a through rate is available to the public, the question may arise whether the Government is entitled to the benefit of the said through rate.

Where rates are established by a common carrier for transportation services, the public generally, and the Government as a part of the public, are entitled to such services at the established rates. Though reduced rates might be given the Government, and, in the absence of statute, to any particular person, yet no higher rates than those established and published would be permitted. The rates offered to the public are therefore available to the Government for like transportation.

Where the entire service is over two or more nonaided roads, the division of the earnings between the different roads is of no concern to the Government, except that when separate settlements are made with the different roads each road would be entitled to its proportion of the total earnings. Such total earnings are generally divided between the different roads

> in interest on an agreed basis, but in the absence of an agreement a mileage basis is adopted as both equitable and practical. *This uniform practice of the accounting officers has been acquiesced in by all railroads to the present time, and should not now be changed unless clearly wrong.* (Italics his.)

The present case was not, however, the first to come to the attention of the Comptroller of the Treasury. The earliest arose in January, 1884, and appears in the *Digest of the Second Comptroller's Decisions,* Volume II, section 1070, as follows:

> The Atchison, Topeka & Santa Fe Railroad Company, operating three several roads (one a land-grant and the others not) having reduced the through rate below the sum of the three local rates: *Held,* that the only feasible mode of settlement is to apportion the whole amount between the land-grant and nonland-grant roads upon a mileage basis.

This was followed in 1889 by a case in *Digest Second Comptroller's Decisions,* Volume III, section 1396:

> The practice of the War Department of using separate requests for transportation to each road in the contemplated route having been adopted for the sole convenience of the railroads: *Held,* That such requests will be presumed to be for limited tickets; that for travel upon them credit must be given the bond-aided railroads on the basis of through limited rates, and that in the absence of positive proof that the holders thereof stopped over the burden

> will be on the railroads to rebut the presumption that the travel was by a continuous journey.

Another early decision involved the Portland-Roseville Road (*Digest 2d Comp. Dec.*, Vol. III, sec. 1164, May 11, 1892):

> In case of transportation en route over the lines of the California & Oregon and Oregon & California Railroad Companies, service on which is free to the Government under section 5 of the act of July 25, 1866 (14 Stat., 239), the carrier is not justified in charging local rates for that part of the service which is not over the free roads, thus depriving the Government of the benefit of through rates. The proper charge is a mileage proportion of the amount which the Government would be obliged to pay for the entire service if not entitled to free service.

So in *Digest Second Comptroller's Decisions*, Volume IV, section 360 (June 15, 1894), we find the following:

> The true principle to govern in the matter of railroad transportation is that the Government shall have the benefit of through limited rates when it can comply with all the conditions appertaining to such rates, as it must do where no road of the through route is bond-aided. * * * Equity and good conscience dictate that the railroad shall not by its after agreement or regulation entered into with connecting lines set a condition impossible of fulfillment on the part of the Government, and thereby prevent the Government from ob-

taining as low rates for similar transportation as the bond-aided railroad conceded to a single individual on a cash-prepaid limited through ticket.

The other decisions of the comptroller, cited above, are equally instructive, but it seems unnecessary to enter into a discussion of them individually. It is sufficient to say that they show conclusively a long-continued and well-established interpretation of the law by the highest administrative officials in accord with the present contention of the United States.

Respectfully submitted.

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